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Constitutional Law - Preemption - Federal Preemption of Common-Law Claims of Unjust Discrimination During Exemption of Rail Transportation from Regulation under Staggers Rail Act

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CONSTITUTIONAL LAW—PREEMPTION—FEDERAL PREEMPTION OF COMMON-LAW CLAIMS OF UNJUST DISCRIMINATION DURING EXEMPTION OF RAIL TRANSPORTATION FROM REGULATION UNDER STAGGERS RAIL ACT

G. & T. Terminal Packaging Co. v. Consolidated Rail Corp. (1987)

In the wake of Congress' efforts to return economic regulation to the marketplace through "deregulation," courts have been forced to determine the extent to which Congress intended to preempt[1] states from regulating in the absence of federal regulation.[2] As the Supreme Court

1. The doctrine of federal preemption is derived from the supremacy clause of the United States Constitution, which provides that the Constitution and the laws made by the federal government "shall be the Supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Two types of preemption have emerged from federal jurisprudence: express preemption and implied preemption. Express preemption exists when a statute expressly forbids a certain type of state regulation or expressly requires the exclusivity of federal regulation. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 543 (1977) (federal labeling requirement on packaged bacon expressly preempted state labeling requirements). In the absence of express language, preemption may be implied. A determination of this nature is necessarily a matter of statutory construction, and requires an examination of the jurisdictional and substantive components of the federal enactment. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-29 (2d ed. 1988). If Congress evidences an intent to "occupy the field" through a given enactment, state action which falls within that field may be preempted regardless of how consistent that action might be with substantive federal policy. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (federal government occupies field of nuclear safety regulation, but states may condition plant construction upon disposal site approval); *cf.* Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 717-18 (1985) (mere comprehensiveness of agency regulation not sufficient to preempt; must be stronger evidence of intent). When Congress has not entirely displaced state regulation, state action will be preempted to the extent that, substantively, it actually and irreconcilably conflicts with the operation or purpose of federal law. Such conflict may arise when it is impossible to comply with both state and federal law. *See* Florida Lime & Avocado Growers Inc., v. Paul, 373 U.S. 132, 142-43 (1963) ("[F]ederal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."). Or, it may arise when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (invalidating state alien registration law given federal statute with same regulatory objective).

2. The courts are forced to determine Congress' intent to continue to occupy a given field of regulation after the regulation is removed, to the exclusion of state administrative and court action. *See, e.g.*, Transcontinental Gas Pipeline Corp. v. State Oil and Gas Bd., 474 U.S. 409, 424 (1986) ("In light of Congress' intent to move toward a less regulated national natural gas market, its decision to remove jurisdiction from [Federal Energy Regulatory Commission] cannot be interpreted as an invitation to the States to impose additional regulations."); G. & T. Terminal Packaging Co. v. Consolidated Rail Co., 830 F.2d 1230, 1234-35

of the United States explained: "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated and in that event would have as much preemptive force as a decision *to* regulate."[3] With respect to rail transportation, Congress decided not to deregulate completely.[4] Rather than dismantle the Interstate Commerce Commission (ICC), Congress amended the Interstate Commerce Act (ICA)[5] with two pieces of deregulatory legislation: the Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act),[6] and the Staggers Rail Act of 1980.[7] One purpose of these amendments was to allow, "to the maximum extent possible," rail rates to be determined through competition in the marketplace.[8]

To achieve this goal, Congress commanded the ICC to exempt rail transportation from regulation when the ICC determined that the federal transportation policy[9] would be promoted without regulation.[10]

(3d Cir. 1987) (common-law actions for unjust discrimination preempted by Interstate Commerce Commission even during exemption from regulation pursuant to Staggers Rail Act), *cert. denied*, 108 S. Ct. 1281 (1988). *See generally* Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429 (1984); Pierce, *Regulation, Deregulation, Federalism and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607 (1985).

3. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) (emphasis in original).

4. *See The Captive Shippers Issue Seven Years After Staggers Enactment*, PUB. UTIL. FORTNIGHTLY, Jan. 7, 1988 [hereinafter *Captive Shippers*] ("In providing a partial deregulation of the rail carriers, the act attempted to strike a balance between the economic needs of the railroads and what the act called 'captive shippers'—those shippers dependent upon one market dominant carrier to move its product.").

Several commentators have expressed concern about deregulation of the transportation industry. *See, e.g.*, Dempsey, *Transportation Deregulation: On a Collision Course?*, 13 TRANSP. L.J. 329, 392 (1981) ("[R]easonable economic regulation of transportation was and is essential in order to protect the public interest."); *Captive Shippers*, *supra* at 25 ("though the Staggers Rail Act has revitalized the railroad industry, controversy persists over the effectiveness of the Act in protecting shippers from rail carriers' abusive monopolistic practices.").

5. 49 U.S.C. §§ 10101-11917 (1984).

6. 45 U.S.C. §§ 801-802 (1982).

7. 49 U.S.C. § 10101a (1982).

8. 49 U.S.C. § 10101a(1) (1982).

9. *Id.*

10. 49 U.S.C. § 10505(a)(1) (1982). The exemption authority of the ICC provides in pertinent part:

§ 10505. Authority to exempt rail carrier transportation

"(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

"(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

"(2) either (A) the transaction or service is of limited scope,

One specific provision of the national transportation policy prohibits unlawful discrimination,[11] and, under the ICA, shippers can seek redress from a carrier that unjustly discriminates.[12] However, in the Staggers Rail Act, Congress amended the savings clause of the ICA which provides that remedies are in addition to those existing at common law, by adding that those remedies are available "except as otherwise provided in this subtitle."[13] Congress further amended the ICA in the Staggers Rail Act by providing that "[t]he jurisdiction of the [ICC] . . . over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules and practices of such carriers is exclusive."[14]

In *G. & T. Terminal Packaging Co. v. Consolidated Rail Co.*,[15] the United States Court of Appeals for the Third Circuit considered whether shippers' common-law claims for unlawful discrimination were preempted when the ICC exempted rail rates from regulation.[16] The *G & T* court held that the text and legislative history of the subtitle which provided for exclusive remedies demonstrated Congress' intent to preempt common-law claims.[17] Furthermore, the court held that, in giving the ICC the power to revoke an exemption, Congress intended that the ICC have ongoing, exclusive jurisdiction over exempt traffic.[18] Additionally, the

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or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

"(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

"(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

"(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of this subtitle to the person, class or transportation is necessary to carry out the transportation policy of section 10101a of this title . . . ."

49 U.S.C. 10505 (1982). The preemptive effect of the exemption provision has been the subject of litigation. *See, e.g.*, Interstate Commerce Comm'n v. Texas, 107 S. Ct. 787, 790 (1987) ("[T]he Commission's power to grant . . . [trailer on flat car] exemptions from state regulation is coextensive with its own authority to regulate, or not to regulate, these intermodal movements by rail carriers."); Illinois Commerce Comm'n v. ICC, 749 F.2d 875 (D.C. Cir. 1984) (states preempted from altering exemption provisions); *see also* Texas v. United States, 730 F.2d 339 (5th Cir. 1984) (certification requirement for states to regulate during exemption constitutional).

11. 49 U.S.C. § 10101a(13) (1982). Common carriers are specifically prohibited from unjustly discriminating. *See* 49 U.S.C. § 10741 (1982).

12. 49 U.S.C. § 11701 (1982).

13. 49 U.S.C. § 10103(a) (1982).

14. 49 U.S.C. § 10501(d) (1982).

15. 830 F.2d 1230 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1281 (1988).

16. *Id.* at 1233-35.

17. *Id.* at 1234.

18. *Id.* at 1235. The ICC's revocation authority is contained in the exemption provision at 49 U.S.C. § 10505(d) (1982). For the text of this provision, see *supra* note 10 and accompanying text.

court reasoned that to permit common-law claims would effectively substitute the court's regulation for the ICC's decision not to regulate.[19]

This Casebrief will discuss the factual and procedural background of the case, and will review the court's majority and dissenting opinions concerning whether common-law claims are preempted by the Staggers Rail Act. This Casebrief will argue that the Staggers Rail Act does not demonstrate sufficient congressional intent to preempt common-law claims. Furthermore, this Casebrief will argue that had the court reached this result, it should then have considered whether the doctrine of primary jurisdiction acts to bar common-law claims of unjust discrimination. This Casebrief will conclude that the court should have allowed the common-law claims to stand.

In 1983, the ICC exempted rail transportation of agricultural commodities from regulation pursuant to its congressional deregulatory mandate.[20] As a shipper of potatoes, G. & T. Terminal Packaging Co. (G & T)[21] was subject to this exemption.[22] G & T filed numerous claims against its carrier, Consolidated Rail Corp. (Conrail),[23] for damaged goods,[24] and in response to those claims Conrail imposed a surcharge on all rail shipments to G & T.[25]

Following a letter from the ICC which explained that the Commission no longer exercised jurisdiction over matters relating to rail rates,[26] G & T filed a complaint in federal district court.[27] G & T argued on statutory, common-law and constitutional grounds that Conrail's rates

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19. *Id.*

20. *Ex Parte No. 436 (sub. no. 2), Rail General Exemption Authority—Miscellaneous Agricultural Commodities*, 367 I.C.C. 298 (1983). In its decision, the ICC explained that "continued regulation of those commodities no longer appear[s] necessary to serve the Nation's transportation policy objectives or to protect shippers from abuse of market power by the railroads." *Id.* at 298.

21. Several shippers brought the action, including G & T, Mr. Sprout, Inc., Tray Wrap, Inc., and Mr. Anthony Spinale. 830 F.2d at 1231 n.1. Mr. Spinale is the president and sole stockholder of G & T. G. & T. Terminal Packaging Co. v. Consolidated Rail Corp., 646 F. Supp. 511, 512 (D.N.J. 1986), *aff'd*, 830 F.2d 1230 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1281 (1988).

22. 830 F.2d at 1231-32.

23. *Id.* at 1232. Conrail is a Pennsylvania corporation engaged in the railroad business. *G & T*, 646 F. Supp. at 512.

24. 830 F.2d at 1232.

25. *Id.* An internal Conrail memorandum indicated that one of the plaintiff shipper's claims exceeded Conrail's revenues. *Id.*

26. *Id.* G & T wrote a letter to the chairman of the ICC to inquire whether the ICC retained jurisdiction over G & T's claims against Conrail, in which G & T alleged that Conrail had imposed unlawfully discriminatory rates. *Id.* The director of the ICC's Office of Proceedings, writing for the chairman, responded that the ICC "no longer exercise[d] jurisdiction over the rates charged by railroads" and further explained that G & T would have to resort to the courts to settle its dispute. *Id.* (quoting Letter from Herbert Hardy, Director of the Office of Proceedings, ICC, to G & T (Oct. 11, 1983)).

27. *Id.*

were discriminatory and unlawful.[28] Conrail moved for summary judgment, and the district court dismissed G & T's statutory and constitutional claims, but allowed G & T's common law action to stand.[29]

Conrail subsequently filed a petition with the ICC seeking a declaratory order that G & T's common-law claims were preempted.[30] Contrary to its previous letter to G & T, the ICC decided that, despite the exemption of rail transportation of agricultural commodities, the ICC retained jurisdiction over allegations of rate discrimination, and that G & T had no independent common-law cause of action.[31] Conrail renewed its motion for summary judgment of G & T's common-law claim based upon the ICC's declaratory order, as well as upon the Supreme Court's 1986 decision in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*.[32] In *Transcontinental*, the Court held that states were preempted from regulating first sales of natural gas when Congress had exempted such sales from regulation.[33] The district court granted Conrail's motion and G & T appealed.

The United States Court of Appeals for the Third Circuit addressed the district court's dismissal of G & T's statutory, common-law and constitutional claims.[34] The court affirmed the district court's dismissal of the statutory and constitutional claims without dissent.[35]

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28. *Id.* For a discussion of the substance of the claims and the Third Circuit's treatment of them, see *infra* notes 34-65 and accompanying text.

29. 646 F. Supp. at 512.

30. 830 F.2d at 1232.

31. *Id.* (citing *Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1987)). The Commission noted that Mr. Hardy's previous letter to G & T was not binding on the Commission. *Id.* at 1232 n.2 (citing *Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1987)).

32. 474 U.S. 409 (1986).

33. *Id.* at 425. In *Transcontinental*, the Mississippi State Oil and Gas Board attempted to regulate the first sale of natural gas within the state by prohibiting producers from discriminating among numerous buyers of the gas. *Id.* at 414. The Supreme Court held that the exemption given by the Federal Energy Regulatory Commission preempted such state regulation. *Id.* at 425.

34. 830 F.2d at 1233.

35. *Id.* at 1233, 1236. Judge Aldisert dissented with respect to the preemption of G & T's common-law claims. *Id.* at 1236 (Aldisert, J., dissenting).

G & T's statutory argument was that Conrail's surcharges violated section 11707 of the ICA because they served as a *de facto* bar to G & T's recovery for lost and damaged goods under that provision. 830 F.2d at 1233. Under section 11707, shippers can recover costs for lost and damaged goods, and carriers are prohibited from avoiding these claims. *Id.* (citing 49 U.S.C. 11707(a)(1) & (c)(1) (1982)). The Third Circuit rejected this argument on the grounds that the surcharges would not affect G & T's ability to recover damages under the ICA, and that "[t]he shippers cite no authority—statutory, regulatory, or judicial—for the proposition that carrier liability under section 11707 is not a cost which may be taken into account in fixing rates." *Id.*

On constitutional grounds, G & T argued that the surcharges deprived it of liberty and property interests without due process of law. *Id.* at 1236. The Third Circuit rejected this argument on the ground that, because the weight of precedent indicates that Conrail is a private actor with respect to constitutional

With regard to whether G & T's common-law claims were preempted after the ICC had exempted agricultural commodities from regulation, the court accepted arguendo that carriers were subject to common-law claims for discriminatory rates prior to the passage of the ICA.[36] The court noted, however, that under the Supreme Court's decision in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*,[37] common-law actions for rate discrimination were to be brought before the ICC.[38] The court thus framed G & T's contention to be whether Congress intended to restore common-law remedies in disputes arising out of rail transportation which the ICC had exempted from regulation.[39]

The court recognized that, in passing the 4 R Act and the Staggers Rail Act, Congress intended to give the railroads greater freedom to set their own rates.[40] The court rejected the suggestion that Congress' decision to decrease the ICC's ratemaking role was evidence that Congress intended "to resurrect common law remedies moribund since 1907."[41] To refute this contention the court noted that in passing the Staggers Rail Act Congress expressly amended the ICA by providing that "the jurisdiction of the Commission . . . over transportation by rail carriers, and the remedies provided in this title with respect to rates, classifications, rules and practice[s] of such carriers, is exclusive."[42] The court resolved the ambiguity whether this section gave the ICC exclusive jurisdiction over remedies provided in the ICA, or over remedies generally, in favor of finding exclusive jurisdiction over remedies generally.[43] In

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analysis, G & T failed to demonstrate governmental action. *Id.* (citing Rendall-Baker v. Kohn, 457 U.S. 830 (1982)); Morin v. Consolidated Rail Corp., 810 F.2d 720 (7th Cir. 1987); Myron v. Consolidated Rail Corp., 752 F.2d 50 (2d Cir. 1985); Wenzer v. Consolidated Rail Corp., 464 F. Supp. 643 (E.D. Pa.), *aff'd*, 612 F.2d 536 (3d Cir. 1979)).

36. *Id.* at 1234.

37. 204 U.S. 426 (1907). In *Abilene Cotton*, shippers brought a common-law suit against the defendant railroad claiming that the railroad's rates were unjustly discriminatory. *Id.* at 430. The Supreme Court concluded that "a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule . . . ." *Id.* at 448.

38. 830 F.2d at 1234. The court observed that "[f]rom the time *Abilene Cotton Oil* was decided to date, no case has permitted a shipper to challenge a freight rate in a common law action." *Id.*

39. *Id.*

40. *Id.* (citing 45 U.S.C. § 803(b)(3) (1982); 49 U.S.C. § 10101a(1) (1982)).

41. *Id.* 1907 is the year in which the Supreme Court decided *Abilene Cotton*. For a discussion of *Abilene Cotton*, see *supra* note 37 and *infra* notes 83-88 and accompanying text.

42. *Id.* (quoting 49 U.S.C. § 10501(d) (1982)). The court viewed this provision as "expressly codif[ying] the holding of *Abilene Cotton*." *Id.* For a discussion of how section 10501(d) can be viewed as different from the holding of *Abilene Cotton*, see *infra* notes 92-99 and accompanying text.

43. 830 F.2d at 1234.

support of its interpretation, the court looked to the legislative history of the section, which emphasized that "[n]o state law or federal or state common law remedies are available."[44] The court found that this provision overrode the savings clause of the ICA, which states that "[e]xcept as otherwise provided," remedies are in addition to those at common law.[45] G & T argued that the provision calling for exclusive remedies before the ICC should be construed to the effect that the ICC only has jurisdiction over remedies with respect to rates when the Commission exercises its ratemaking authority, but that the ICC forfeits its jurisdiction over such remedies when it has exercised its exemption authority.[46] Again, the court was unwilling to take such a literal approach to the ICC's jurisdiction over remedies.[47]

The court also noted that such a construction of the statute would be "inconsistent with the statutory scheme" of the ICC's "ongoing jurisdiction over exempt traffic," based upon the ICC's power to revoke an exemption.[48] The court further asserted that "[r]ecognition of a common-law remedy with respect to rates would have the effect of substituting a court's regulation for the Commission's decision in favor of deregulation."[49] The court viewed this situation to be in conflict with Congress' intent to permit rail rates, once exempt from regulation, to be set by the marketplace, subject to revocation only by the ICC.[50] Thus, the court determined that relief was unavailable until the ICC revoked

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44. *Id.* (quoting H.R. CONF. REP. No. 96-1430, 96th Cong., 2d Sess. 106, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3978, 4110, 4138). The text of the legislative history provides:

> The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.

H.R. CONF. REP. No. 96-1430, 96th Cong., 2d Sess. 106, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3978, 4138.

45. 830 F.2d at 1234 (quoting 49 U.S.C. § 10501(d) (1982)). The court further asserted that "[t]he explicit legislative intent that only federal statutory remedies exist is precisely the type of exception contemplated by the savings provision." *Id.* For the text of section 10501(d), see *supra* note 10.

46. 830 F.2d at 1234.

47. The court reasoned that "[t]he only possible textual support for such an interpretation of the section in the literal reading rejected above [in determining that the ICC had exclusive jurisdiction over the provision of remedies with respect to rates.]" *Id.*

48. *Id.* at 1234-35 (quoting Coal Exporters Ass'n v. United States, 745 F.2d 76, 82 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985)) ("Congress [intended] that 'there be continuing evaluation of the appropriateness of regulation and continuing deregulation where consistent with the Act's policies'. ").

49. *Id.*

50. *Id.* at 1235. The court's rationale for this judgment was that "[t]he ongoing jurisdiction to reconsider the exemption in light of competitive conditions is conferred in the first instance on the Commission, not on the courts." *Id.*

the exemption.[51] Furthermore, according to the court, such a result was consistent with the Supreme Court's decision in *Transcontinental* as well as with the decisions of other federal courts.[52]

In its conclusion, the court responded to the criticism of Judge Aldisert in his dissent[53] that the decision leaves shippers without a remedy.[54] The majority rejected this argument on the ground that the ICC, in granting the exemption, had already determined that "regulation is not needed to protect shippers from abuse of market power,"[55] and that G & T could either use some alternate mode of transportation or seek revocation of the exemption from the ICC.[56]

In dissent, Judge Aldisert disagreed on the preemption issue.[57] Judge Aldisert agreed with the majority that Congress enacted the Staggers Act to allow competition in the marketplace to set rail rates[58] and that the ICC was to exempt rail traffic when regulation was not necessary to carry out the federal transportation policy.[59] He noted, however, that Congress expressly provided that one goal of the federal transportation policy is "to prohibit unlawful discrimination."[60] In addition, Congress expressly preserved common-law remedies in the savings clause of the

51. *Id.* The court reasoned that, until the ICC determined that Conrail was "dominant" over G & T, the "court [could not] grant relief" to G & T. *Id.* (citing Bessemer and Lake Erie R.R. Co. v. ICC, 691 F.2d 1104 (3d Cir. 1982), *cert. denied*, 462 U.S. 1110 (1983)).

52. *Id.* (citing *Transcontinental*, 474 U.S. 409 (1986); Alliance Shippers, Inc. v. Southern Pac. Transp. Co., 673 F. Supp. 1005 (C.D. Cal. 1986); Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R., No. 84-1267 (N.D. Ohio Sept. 25, 1986)). In its citation to *Transcontinental*, the court noted that the Supreme Court's decision in Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), was inapposite in the instant case. *Id.* at 1235 n.3. The court explained that whereas in *Nader* the plaintiff's tort claim could be recognized "without intruding upon any judgment of the regulatory agency . . . recognition of [shippers' claims] for discriminatory rates would involve case-by-case judicial regulation of rates . . . ." *Id.*

53. *See id.* at 1238-39 (Aldisert, J., dissenting).

54. *Id.* at 1235-36.

55. *Id.* at 1235 (quoting 49 U.S.C. § 10505(a)(2)(B) (1982)).

56. *Id.* at 1236. Chief Judge Gibbons stated that "Congress and the Commission have determined that the market is adequate protection; it is not the place of this court to disagree with that determination." *Id.*

57. *Id.* at 1236 (Aldisert, J., dissenting). He began his analysis with the precept that preemption is a question of congressional intent, and that "repeals of common-law remedies by implication are not favored: a statute will not be construed as taking away a common law right unless the right is so repugnant that it renders the statute's provisions nugatory." *Id.* (Aldisert, J., dissenting) (quoting *Abilene Cotton*, 204 U.S. at 437).

58. *Id.* at 1236-37 (Aldisert, J., dissenting) (citing H.R. CONF. REP. NO. 1430, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4110, 4111).

59. *Id.* at 1237 (Aldisert, J., dissenting) (citing 49 U.S.C. § 10505 (1982)).

60. *Id.* (Aldisert, J., dissenting) (citing 49 U.S.C. § 10101a(13)). The text of section 10101a(13) provides that the policy of the United States government in regulating the railroad industry is "to prohibit predatory pricing and practices to

ICA.[61] Thus, according to Judge Aldisert, one can "inescapably" conclude that "common law remedies are available *inter alia* to prohibit unlawful discrimination."[62]

In support of his position, Judge Aldisert observed that unlawful discrimination was not permitted before Congress passed the ICA,[63] that it is not permitted under the ICA and that under the Act shippers are entitled to relief for unlawful discrimination.[64] However, in Judge Aldisert's interpretation, because the remedial provisions of the ICA do not apply during an exemption and because Congress intended for remedies to exist in order to further the policy of prohibiting unlawful discrimination, common-law remedies are necessary to promote Congress' intent.[65]

Judge Aldisert criticized Conrail's position because it allowed G & T merely an opportunity to petition for revocation of the exemption, and not an opportunity to be heard on the merits of the unlawful discrimination claims.[66] He contended that such a remedy would be inadequate not only because shippers would be forced to overcome the initial burden of proving the need for revocation, but because a revocation order

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avoid undue concentrations of market power and *to prohibit unlawful discrimination*." 49 U.S.C. § 10101a(13) (emphasis added).

61. 830 F.2d at 1237 (Aldisert, J., dissenting) (citing 49 U.S.C. § 10103).

62. *Id.* at 1237 (Aldisert, J., dissenting).

63. *Id.* at 1237-38. (Aldisert, J., dissenting). Judge Aldisert briefly surveyed the existence of actions for discriminatory rates at common law. *Id.* (Aldisert, J., dissenting) (citing Messenger v. Pennsylvania R.R. Co., 37 N.J.L. 531 (1874) (railroads as common carriers "owe[] an equal duty to all and . . . cannot . . . make unequal preferences"); McDuffee v. Portland and Rochester R.R., 52 N.H. 430, 450 (1873) (unreasonable discrimination violates common right, amounts to "insubordination and mutiny," and is actionable at common law); London & N.W. Ry. Co. v. Evershed, 3 App. Cas. 1029 (House of Lords 1878) ("The one right . . . of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic.")).

64. 830 F.2d at 1238 (Aldisert, J., dissenting) (citing 49 U.S.C. § 10741 (1982) (prohibiting unreasonable discrimination between shippers when providing substantially similar services); 49 U.S.C. § 11701 (1982) (providing remedy for unjust discrimination before the ICC)).

65. 830 F.2d at 1238 (Aldisert, J., dissenting). Judge Aldisert reasoned that "in light of Congress' policy 'to prohibit unlawful discrimination,' . . . it seems to me that Congress did not intend to leave shippers without a remedy for discriminatory conduct practiced by rail carriers exempted from regulation. A common law action would provide such a remedy. And Congress expressly anticipated this under the savings clause of the Staggers Act . . . ." *Id.* (Aldisert, J., dissenting) (citations omitted). For the court's contrary view on this point, see *supra* notes 45-47 and 53-56 and accompanying text.

66. *Id.* (Aldisert, J., dissenting). Judge Aldisert asserted that under the court's view "the shipper is only given the right to petition the ICC to withdraw its exemption and restore regulation of the entire railroad industry's transportation of potatoes. A proceeding to restore regulation of the entire railroad industry is not the mirror image of a proceeding to prove discrimination against a particular shipper by a particular carrier." *Id.* (Aldisert, J., dissenting).

would have only prospective application,[67] and, therefore, would not provide a shipper with compensatory damages.[68] Judge Aldisert further reasoned that the two remedies proposed by the majority, that shippers either petition the ICC for revocation of an exemption or seek alternative means of shipment, could lead to irreparable harm to shippers, and therefore could not have been intended by Congress as the exclusive remedies.[69]

Judge Aldisert also rejected Conrail's argument, based on the Supreme Court's decisions in *Abilene Cotton* and *Transcontinental*, that to allow common-law remedies would conflict with the federal regulatory scheme and would create a lack of uniformity among the states.[70] He gave two reasons for rejecting this argument. First, he denied that there would be any conflict; because common-law claims would be allowed only during periods of exemption, when there would be no regulation with which to conflict.[71] Second, the ICC could revoke the exemption

67. *Id.* at 1238-39 (Aldisert, J., dissenting). In Judge Aldisert's interpretation, "the proceedings before the Commission would not take place in a judicially neutral ambience; the petitioner would have the very high burden of overcoming the legislatively-declared public policy of minimal Federal regulatory control." *Id.* at 1239 (Aldisert, J., dissenting).

68. *Id.* (Aldisert, J., dissenting). To Judge Aldisert, this was "the black hole of Conrail's theory," that the ICC would have no power to provide a remedy for unlawful discrimination during an exemption period. *Id.* (Aldisert, J., dissenting).

69. *Id.* (Aldisert, J., dissenting). Judge Aldisert concluded that when "the Commission has surrendered its jurisdiction over a field of rail transportation by granting an exemption pursuant to the Staggers Act, a common-law remedy exists under the savings clause of the Act to remedy unlawful discrimination practiced by rail carriers during the exemption period." *Id.* (Aldisert, J., dissenting) (citing First Pa. Bank v. Eastern Airlines, Inc., 731 F.2d 1113, 1120 (3d Cir. 1984) (following deregulation of the Civil Aeronautics Board courts were free to apply common-law rules to airline rates)).

70. *Id.* at 1239-40 (Aldisert, J., dissenting).

71. *Id.* (Aldisert, J., dissenting). On this point, Judge Aldisert relied on the Supreme Court's decision in Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976). In *Nader*, the Court permitted the plaintiffs to bring a common-law suit for misrepresentation without first requiring them to present their claim to the Civil Aeronautics Board. *See* 426 U.S. at 308. Judge Aldisert found the Supreme Court's analysis in *Nader*, in which the Court distinguished the plaintiffs' claims from those in *Abilene Cotton*, persuasive with respect to G & T's claims:

> In *Abilene* the carrier, if subject to both agency and court sanctions, would be put in an untenable position when the agency and a court disagreed on the reasonableness of a rate. The carrier could not abide by the rate filed with the Commission, as required by statute, and also comply with a court's determination that the rate was excessive. The conflict between the court's common-law authority and the agency's ratemaking power was direct and unambiguous. *The court in the present case, in contrast, is not called upon to substitute its judgment for the agency's* on the reasonableness of a rate—or, indeed, *on the reasonableness of any carrier practice.*

830 F.2d at 1240 (Aldisert, J., dissenting) (quoting *Nader*, 426 U.S. at 299-300 (emphasis supplied by court)).

and reassert jurisdiction at any time that it determined that common-law remedies were not advancing the federal transportation policy.[72]

Finally, Judge Aldisert stated that the preemption of common-law remedies "blurs the distinction between regulation of rail rates and adjudication of a tort . . . ."[73] He argued that *Transcontinental* was inapposite in the instant case because in *Transcontinental* the Supreme Court was concerned with direct regulation on the part of a state administrative agency, and not with an adjudication of a tort within the courts.[74] He recognized that the federal deregulation preempts state regulation, but he expressed his unwillingness to extend deregulation to common-law claims by treating common-law claims as *de facto* regulation.[75]

It is submitted that the court incorrectly held G & T's common-law claims to be preempted under the Staggers Rail Act, because the language, legislative history and policy of the Act do not manifest sufficient congressional intent to support such a holding. The Third Circuit did not specifically address whether it was engaging in express or implied preemption analysis. This distinction is critical when considering the preemption of common-law claims: the Supreme Court has established that, in the absence of express or compelling congressional intent, a strong presumption exists against the preemption of traditional state functions,[76] such as the provision of common-law remedies.[77] Because

72. 830 F.2d at 1240 (Aldisert, J., dissenting) (citing 49 U.S.C. § 10505(d) (1982)).

73. *Id.* at 1240-41 (Aldisert, J., dissenting). Judge Aldisert argued that courts adjudicate and do not regulate, and therefore should not be subject to the same restrictions as a state administrative agency. *Id.* (Aldisert, J., dissenting) For an alternative interpretation of the court's regulatory function, see *infra* notes 110-121 and accompanying text.

74. *Id.* at 1240 (Aldisert, J., dissenting).

75. *Id.* at 1241 (Aldisert, J., dissenting).

76. *See, e.g.*, International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (traditional interest in health and safety prevents Clean Water Act from preempting common-law claims of nuisance against source-state pollutors); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719-20 (1985) (state regulation of blood plasma, as traditional interest in health and safety, not preempted by Food and Drug Administration regulations); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the states 'we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 374 (1978) ("Territorial protection of vital interests . . . is the category that is most impervious to preemption.").

77. *See, e.g.*, International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (common-law claims of nuisance not preempted by Clean Water Act); Silkwood v. Kerr McGee Corp., 464 U.S. 238 (1984) (punitive damage awards as part of common-law claims not preempted by jurisdiction of Nuclear Regulatory Commission); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (traditional common-law tort claims in "maintenance of domestic peace" not preempted by jurisdiction of National Labor Relations Board); *but cf.* Farmers

the Staggers Rail Act does not expressly provide for the preemption of common-law claims for unjust discrimination during an exemption,[78] and because such claims are consistent with Congress' objectives in exempting rail traffic,[79] the Third Circuit should have found that G & T's common-law claims were not preempted. Had the court reached this properly circumscribed result, it should then have considered whether the doctrine of primary jurisdiction[80] would have required G & T to present its claims first to the ICC despite the exemption.[81] It is submitted that G & T's claims, which are based upon traditional notions of common-carrier tort liability, are within the courts' expertise to resolve and the court would not have been required to invoke the ICC's primary jurisdiction.[82]

The *G & T* court's first error was its assumption that federal preemption of common-law claims for unjust discrimination has existed since the Supreme Court's 1907 decision in *Abilene Cotton*.[83] In *Abilene Cotton*, the Supreme Court determined that issues of rate reasonableness must be resolved first by the ICC,[84] but the Court did not reach its deci-

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Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959) (common-law claims of defamation involving broadcasts governed by equal opportunity broadcast provisions of Federal Communications Act impliedly preempted).

78. For a discussion of the absence of express congressional intent to preempt common-law claims by the Staggers Rail Act, see *infra* notes 94-109 and accompanying text. For the purpose of this analysis, it is assumed that G & T's claims were based on state common law, and that the district court had diversity jurisdiction based upon Conrail and G & T's incorporation in Pennsylvania and New York, respectively and upon sufficient jurisdictional amount in controversy. *See supra* notes 21, 23 & 25.

79. For a discussion of Congress' objectives in exempting rail traffic, see *infra* notes 94-105 and accompanying text.

80. The doctrine of primary jurisdiction presents a framework for allocating powers between courts and agencies. United States v. Western Pac. R.R. Co., 352 U.S. 59, 65 (1956). The doctrine applies "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 63-64. For a thorough discussion of the doctrine of primary jurisdiction generally, see 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22 (1983); L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 121-40 (1965).

81. For a discussion of the need to apply the doctrine of primary jurisdiction in the present case, see *infra* notes 122-23 and accompanying text.

82. For a discussion of G & T's claims under a primary jurisdiction analysis, see *infra* notes 124-31 and accompanying text.

83. *See* 830 F.2d at 1235. In *G & T*, the Third Circuit implicitly treated *Abilene Cotton* as a preemption case when it stated that "we agree with the district court that the shippers' common law claims . . . are preempted. *Abilene Cotton* is still the controlling rule." *Id.* For a further discussion of the court's treatment of *Abilene Cotton* as a case involving federal preemption, see *supra* note 37-42 and accompanying text.

84. *Abilene Cotton*, 204 U.S. 426, 442 (1907). The Court specifically stated: "[T]he independent right of an individual originally to maintain actions in

sion on supremacy clause grounds. Indeed, the Court recognized that its decision was necessarily contrary to Congress' statement in the ICA that the remedies provided by the ICC were in addition to those available at common law.[85] Rather, the Court determined that in order for the ICC to function properly in setting uniform standards for rail rates, shipper's claims for overcharges and rate discrimination must be brought before the ICC as an initial matter.[86] The Court's decision was an application of the doctrine of primary jurisdiction,[87] which operates when a claim originally cognizable in the courts "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of the administrative agency."[88]

Thus, the *G & T* court's reliance on *Abilene Cotton* as the centerpiece of its preemption analysis was misplaced. The continuing validity of a decision based upon primary jurisdiction is highly uncertain when the regulatory scheme upon which the decision was based is removed through deregulation.[89] Furthermore, in a case subsequent to *Abilene Cotton*,[90] the Supreme Court expressly held that the primary jurisdiction of the ICC did not defeat all common-law claims of unjust discrimination.[91]

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courts to obtain pecuniary redress for violations of the act . . . must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning the wrongs of the character of the one here complained of." *Id.*

85. *Id.* at 446, 448. As Professor Davis observed: "The primary jurisdiction principle was sufficiently strong in the *Abilene* case to override the unambiguous statutory words in the provisions that remedies at common law continued." K. DAVIS, *supra* note 80, at 89.

86. 204 U.S. at 440-42.

87. *See* K. DAVIS, *supra* note 80, at 88-89. The doctrine of primary jurisdiction is believed to have originated in *Abilene Cotton*. *Id.* at 88.

88. United States v. Western Pac. R.R. Co., 352 U.S. 59 (1956) (issue in tariff rate dispute whether de-fused napalm bomb was "incendiary bomb" or "gasoline in steel drums" within primary jurisdiction of ICC).

89. *See* First Pa. Bank v. Eastern Airlines, Inc., 731 F.2d 1113 (3d Cir. 1984). The *First Pennsylvania* court described this effect with respect to the regulation of airline rates for shipping packages:

> With respect to rates, a succinct statement of the effect of deregulation would be that the [Civil Aeronautics Board] was shorn of its powers to pass upon the reasonableness of rates for interstate air transportation of property, and to prescribe future rates to replace those found to be unreasonable. Abolition of these powers of the CAB simply abrogated *pro tanto* the doctrine of 'primary jurisdiction' with respect to such rates. The courts were thus left free to proceed without circuity to apply directly the familiar federal common law rules relating to the subject matter of released value rates [limiting liability for shipment of goods].

Id. at 1120.

90. Pennsylvania R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121 (1914).

91. *See id.* at 130. The Supreme Court stated: "The [Interstate Commerce Act] did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the

Against this background, the Third Circuit incorrectly assumed that the holding of *Abilene Cotton* was still valid and that it stood for the proposition that Congress had preempted common-law remedies. From these assumptions, the *G & T* court's next error was to frame the issue in the case too narrowly. Rather than examine the Staggers Rail Act to determine whether Congress intended "to resurrect common law remedies moribund since 1907,"[92] the court should have asked whether in the Staggers Rail Act Congress for the first time intended to preempt common-law remedies. This distinction is essential because of a shift in presumption: if Congress had preempted common-law claims from the time of *Abilene Cotton*, then the presumption would be that preemption continues unless Congress otherwise manifested its intent in the Staggers Rail Act. But where the claims have been barred on the basis of primary jurisdiction, which operates on the assumption that the claims are *originally cognizable in the courts*, a heavy burden remains to show that Congress intended to preempt common-law claims in the face of deregulation.[93]

In its analysis of the preemptive effect of the Staggers Rail Act, the court properly focused on the section which provides that "[t]he jurisdiction of the [ICC] . . . over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules and practice[s] of such carriers, is exclusive."[94] The court recognized two ambiguities in interpreting this section: first, that the ICC might have exclusive jurisdiction only over those remedies actually provided; and second, that the ICC might only have exclusive jurisdiction when the ICC actually regulates rates, but that it does not retain exclusive jurisdiction when it exempts rail rates.[95] The court believed that the legislative history to this section, which states that "[n]o state law or federal or state common law remedies are available,"[96] resolved the am-

exercise of the administrative power and discretion of the Commission . . . ." *Id.* For a discussion of how the Supreme Court's analysis in Pennsylvania Railroad Co. v. Puritan Coal Mining Co. should have been applied to deregulation under the Staggers Rail Act in the *G & T* case, see *infra* notes 126-131 and accompanying text.

92. 830 F.2d at 1234.

93. This is so because deregulation abrogates the agency's primary jurisdiction, and returns the matter to the courts. *See* First Pa. Bank v. Eastern Airlines, Inc., 731 F.2d 1113, 1122 (3d Cir. 1984) ("Deregulation [of the Civil Aeronautics Board] . . . merely did away with the applicability of the doctrine of primary jurisdiction.").

94. 830 F.2d at 1234 (quoting 49 U.S.C. § 10501(d) (1982)). For a detailed discussion of the court's analysis of this section, see *supra* notes 42-47 and accompanying text.

95. 830 F.2d at 1234.

96. *Id.* (quoting H.R. CONF. REP. No. 96-1470, 96th Cong., 2d Sess. 106, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3978, 4138).

biguities against G & T's "literal"[97] reading of the statute, and in favor of preemption of common-law remedies at all times. Even with this legislative history, however, ambiguity persists whether Congress intended to preempt common-law remedies during an exemption. While it is unambiguous that Congress expressly preempted common-law remedies when the ICC exercises its regulatory powers, even the *G & T* majority admitted that a *literal* reading of the statute suggests that the ICC does not retain exclusive jurisdiction over remedies when it exempts rail rates from regulation.[98] Furthermore, the legislative history does not address this issue; it explains only how, and not *when*, the provision for exclusive remedies is to apply.[99] The need for a plain and unmistakable statement in the statute itself is particularly compelling when a court is considering the preemption of a traditional state function in the *absence* of regulation, and the ambiguous jurisdictional statement is not sufficient to overcome this presumption.

Because the text and legislative history of this jurisdictional provision are ambiguous with respect to Congress' intent, it is necessary to examine other relevant provisions of the Staggers Rail Act to determine whether Congress intended to preempt common-law remedies during periods of exemption. As Judge Aldisert noted in his dissent, Congress both expressly prohibited unjust discrimination as a matter of national transportation policy,[100] and expressly provided that this policy must be promoted as a condition of exemption.[101] He also noted that Congress expressly saved common-law remedies in the savings clause.[102] For Congress to give the ICC exclusive jurisdiction over remedies "provided," and yet at the same time to maintain in the savings clause that, "except as otherwise provided," remedies are in addition to those at common law,[103] Congress must have intended for common-law remedies to be preserved when the ICC does not provide a remedial scheme, such as during periods of exemption.[104] Although this conclusion may not be "inescapable," as Judge Aldisert contends,[105] it does have extremely strong textual support in Congress' intent which underlies the above provisions of the Staggers Rail Act.

The next error in the *G & T* court's preemption analysis was to

97. 830 F.2d at 1234. The court twice referred to G & T's statutory interpretation as "literal." *Id.*

98. *See id.*

99. For the text of the legislative history, see *supra* note 44.

100. *Id.* at 1237 (Aldisert, J., dissenting) (citing 49 U.S.C. § 10101a(13) (1982)). For a discussion of Judge Aldisert's analysis of Congress' intent, see *supra* notes 58-65 and accompanying text.

101. *Id.* (Aldisert, J., dissenting) (citing 49 U.S.C. § 10505 (1982)). For the text of section 10505, see *supra* note 10.

102. *Id.* (Aldisert, J., dissenting) (citing 49 U.S.C. § 10103 (1982)).

103. *See* 49 U.S.C. § 10103 (1982).

104. 830 F.2d at 1237 (Aldisert, J., dissenting).

105. *See id.* (Aldisert, J., dissenting).

point to the ICC's revocation authority as proof of the preemptive power of the ICC's "ongoing jurisdiction."[106] Any suggestion from this section that Congress intended the ICC to retain exclusive jurisdiction over remedies is remote. The section merely provides that "[t]he Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle . . . is necessary to carry out the [national] transportation policy . . . ."[107] Although the power given by Congress to the ICC to revoke an exemption is broad, there is no suggestion, either express or implied, that Congress intended this power to exclude the courts from providing common-law remedies.[108] As Judge Aldisert observed: "If the ICC subsequently determines that rail carriers are abusing an exemption or that common law actions are advancing results inconsistent with the national transportation policy . . . the Commission can revoke the exemption and reimpose regulation on the relevant rail traffic."[109]

For Congress to have preempted common-law remedies during an exemption, it should have provided expressly for such preemption in the statement of general jurisdiction, or in the exemption and revocation provisions. Because of the absence of express or compelling congressional intent, the strong presumption against preemption of common-law claims should have prevailed.

The *G & T* court next erroneously argued that "[r]ecognition of a common law remedy with respect to rates would have the effect of substituting a court's regulation for the commission's decision in favor of deregulation."[110] Although this argument can be construed to be either an irreconcilable conflict-preemption argument or a primary jurisdiction argument, it appears that the court intended it only as the former. As a primary jurisdiction issue, the court would have needed to examine the specific, factual nature of G & T's claims,[111] which it failed to do.

As a preemption argument, however, the court's conclusion cannot withstand the Supreme Court's analysis in *Silkwood v. Kerr McGee Corp.*[112] Prior to *Silkwood*, the Supreme Court held that the Nuclear Regulatory Commission had occupied the field of nuclear safety, and that states were preempted from regulating safety requirements of nuclear power

106. *Id.* at 1235 (citing 49 U.S.C. § 10505(d) (1982)).

107. 49 U.S.C. § 10505(d) (1982). For the full text of the relevant portions of section 10505, see *supra* note 10.

108. *Cf.* New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 415-17 (1973) (text and legislative history to Federal Work Incentive Program amending Social Security Act insufficient to show congressional intent to preempt all state work programs).

109. 830 F.2d at 1240 (Aldisert, J., dissenting).

110. *Id.* at 1235.

111. *See* K. DAVIS, *supra* note 80, at § 22-2.

112. 464 U.S. 238 (1984).

plants.[113] In *Silkwood*, the Court upheld a $10 million punitive damages award despite Kerr-McGee's argument that punitive damages imposed *de facto* state regulation upon the safety of nuclear power plants, and should therefore be preempted.[114] The Court acknowledged the regulatory effect of common-law, punitive damage awards;[115] however, the Court held that, absent express or compelling congressional intent, common-law claims are preserved in their entirety.[116] The Court concluded that Congress intended to permit some tension between federal and state powers, and that it was bound by Congress' intent.[117]

In *G & T*, even if common-law claims for rate discrimination during an exemption were to have a regulatory effect,[118] there is no express or compelling congressional intent that they be preempted.[119] On the contrary, as Judge Aldisert correctly pointed out, common-law claims are entirely consistent with Congress' intent to prohibit unlawful discrimination during exemptions.[120] And as Judge Aldisert also noted, the potentially crippling burdens placed on shippers, such as requiring a shipper to seek revocation of an exemption before it can obtain remedies from the ICC, cannot be implied to have been the intent of Congress given the plain language of the Staggers Rail Act prohibiting unlawful discrimination.[121] The Third Circuit should have accepted as

113. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983).

114. *Silkwood*, 464 U.S. at 249 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.")).

115. 464 U.S. 256. The Court explained that "[i]t may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards. . . ." *Id.*

116. *Id.* at 255. The Court stated: "[P]unitive damages have long been a part of traditional state tort law . . . [and] Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Id.*

117. *Id.* at 256. The court concluded:

> [N]o doubt there is tension between the conclusion that safety regulation is the exclusive concern of the Federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less.

Id.

118. *See* 830 F.2d at 1235. Judge Aldisert argues strenuously that adjudication by a court is not *de facto* regulation, but this position fails to take into account the *Silkwood* analysis. *See id.* at 1240-41 (Aldisert, J., dissenting). For a summary of Judge Aldisert's argument, see *supra* note 73-75 and accompanying text.

119. For an analysis of the lack of express or compelling congressional intent, see *supra* notes 94-109 and accompanying text.

120. 830 F.2d at 1237 (Aldisert, J., dissenting).

121. *Id.* at 1238-39 (Aldisert, J., dissenting). For a discussion of Judge Al-

permissible the tension that is created when common-law claims are allowed, as the Supreme Court did in *Silkwood*.

Had the Third Circuit reached this result, it would then have been necessary for the court to determine whether G & T was still required to present its claims initially to the ICC under the doctrine of primary jurisdiction. Courts have the power to notice this doctrine despite the fact that the parties have not raised it.[122] Because G & T's claims are based strictly on a common-law, common-carrier theory of unlawful discrimination which states that a common carrier is prohibited from charging different rates for identical services,[123] such claims are fully within the court's competence to resolve and would not require the special expertise of the ICC. The *G & T* court should have permitted the claims.

This conclusion is consistent with the Supreme Court's holdings in *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*,[124] and in *Nader v. Allegheny Airlines, Inc.*[125] In *Pennsylvania Railroad*, a plaintiff shipper brought a common-law action for unjust discrimination against a carrier for the carrier's failure to provide a pro rata share of rail cars, in violation of the carrier's own rule against discrimination.[126] The Court held that where the discrimination alleged is a violation of a rule which is fair on its face and is not challenged as unfair, the dispute raises only questions of fact, and are therefore not within the ICC's primary jurisdiction and may be pursued in federal or state court as a breach of the common-law duty not to discriminate.[127] In *Nader*, the plaintiff brought a common-law action against Allegheny Airlines for being "bumped" from a flight.[128] He argued that the Airline's failure to disclose its practice of deliberate overbooking was a fraudulent misrepresentation.[129] The Court held that the claim was within the competence of the courts to resolve, and that it did not require an initial determination whether deliberate overbooking was an "unfair practice," which would have been within the primary jurisdiction of the then existing Civil Aeronautics Board.[130] In G & T's case, there are no intricate issues of rate reasonableness to be

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disert's approach to the absence of remedies under the Staggers Rail Act, see *supra* notes 66-69 and accompanying text.

122. *See, e.g.*, Distrigas v. Boston Gas Co., 693 F.2d 1113, 1117 (1st Cir. 1982) ("It is now well established that the doctrine is not waived by the failure of the parties to present it in the trial court, or on appeal, since the doctrine exists for the proper distribution of power between judicial and administrative bodies and not for the convenience of the parties.").

123. *See generally* 13 AM. JUR. 2d *Carriers* § 175 (1964).

124. 237 U.S. 121 (1914).

125. 426 U.S. 290 (1976).

126. *Pennsylvania R.R.*, 237 U.S. at 122-23.

127. *Id.* at 131-32.

128. *Nader*, 426 U.S. at 292-94.

129. *Id.* at 295.

130. *Id.* at 299-300.

resolved by the ICC, or to be left to the marketplace.[131] G & T's allegation that Conrail attached a surcharge on shipments to G & T in retaliation for damage claims rightfully brought by G & T presents a straightforward tort claim for unjust discrimination. The Third Circuit should have denied Conrail's motion for summary judgment and permitted G & T to proceed with its claim.

CONCLUSION

The Third Circuit improperly held that G & T's common-law claims of unjust discrimination were preempted during the exemption period. By failing to distinguish between express preemption and implied preemption,[132] and between implied preemption and primary jurisdiction,[133] the court reached its result without establishing a sufficient showing of congressional intent. Deregulation, as a relatively new phenomenon, presents novel questions with respect to federal supremacy, and it is essential that in resolving these questions courts respect and retain the delicate federal balance which has become an integral part of the doctrine of federal preemption. The strong presumption against preemption of traditional state functions in the absence of express or compelling congressional intent should be given clear recognition by the courts in cases which involve deregulation.

William A. Threadgill

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131. There may be certain issues of reasonableness which arguably are beyond both the courts or the ICC to regulate because of the administrative decision to exempt traffic from regulation; however, it does not appear that the instant case present such an issue, in light of Congress' overriding intent to prohibit unjust discrimination during periods of exemption. *See* 49 U.S.C. § 10505(a)(1) (1982).

132. For a discussion of the need for the court to make this distinction, see *supra* notes 76-79 and accompanying text.

133. For the court's merging of these two doctrines, see *supra* notes 83-93 & 110-11 and accompanying text.